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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 447.

FREDERICK P. MUSTELL,
Petitioner,

v.

DR. FRANK A. ROSE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENTS

In Opposition to Petition for Certiorari.

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PRELIMINARY STATEMENT.

In the section of the petition, entitled "Reasons for Granting the Writ" (P. 7), it is stated that, "In recent years this enlightened court has pronounced in no uncertain terms that the constitutional umbrella of protection extends to people in all phases of life, including the indigent, the union member, the Negro, the illiterate, the teacher, the Communist, the juvenile, and the accused to cite a few." In order to avoid any misunderstanding of the status of the parties to this case, we wish to state that the petitioner does not come within any of said classifications.

We have been advised that the certified transcript of the record in the Supreme Court of Alabama, which has been mailed to the Supreme Court of the United States, contains more pages than are contained in the record on file in the Supreme Court of Alabama, and that the numbering of the pages does not coincide. In this brief, where reference is made to a portion of the record, such will refer to the record on file in the Supreme Court of Alabama, which is the only copy of the record available to the attorney for respondents.

STATEMENT OF THE CASE.

While we submit that the petitioner has failed to show any sound reason for granting certiorari, we shall state what we consider to be the material facts in this case, for the purpose of considering the merits of this petition for a writ of certiorari, and demonstrate that there should be no occasion for review, by the Supreme Court of the United States, of the opinion of the Supreme Court of Alabama.

Petitioner, as complainant, sued respondents, individually, and as members of the Junior Promotions Committee of the Medical College of Alabama, alleging in the complaint, as originally filed (R. 1-9), that he had completed the courses of study in the Freshman, Sophomore and Junior years in said Medical College (R. 4-5); that, on May 28, 1964, the Junior Promotions Committee of said Medical College met for the purpose of determining what students should be promoted to the Senior class; that there resulted at said meeting a conspiracy to change complainant's (petitioner's) actual recorded grades in his courses in Medicine, Surgery and Psychiatry, for the arbitrary and capricious purpose of declaring him academically deficient; that complainant (petitioner) was, on May 29, 1964, informed by respondent, Dr. S. Richardson Hill, Dean of said Medical College, that he was terminated from said Medical College by reason of academic deficiencies as determined and ascertained by the Junior Promotions Committee of the Medical College of Alabama (R. 5-6).

In respondents' answer to the complaint, as originally filed (R. 15-29), the above allegations were denied. It was stated that, at its meeting on May 28, 1964, the Junior Promotions Committee discussed, in detail, the performance of complainant (petitioner) for his entire tenure in said Medical College; and, on the basis of the total evaluation of complainant (petitioner) said Com-

mittee recommended to respondent, Dr. S. Richardson Hill, Dean, Medical College, that complainant be dropped from the Medical College; that Dr. S. Richardson Hill, Dean, Medical College of Alabama, advised complainant (petitioner) by letter, of the decision to terminate his attendance at the Medical College of Alabama, due to the number of failing grades which he had incurred (R. 18, 557).

At the commencement of the trial of this case, the trial judge made the following statement:

> "* * * a pre-trial of this cause was held on the 29th day of March, 1966, the purpose of which of course was delineation of the issues involved in this case. And by consent of counsel on both sides, and through clear understanding, the sole issue involved in this case has been fixed, and the only valid, legal issue posed by the pleading is whether or not the Junior Promotion Committee of the Medical College of the University of Alabama, acting through its agents or employees or professors, arbitrarily and capriciously conspired, to effect the dismissal of the complainant, Frederick T. Mustell, the complainant from the Medical College, and as part of said conspiracy altered or otherwise changed the complainant's grades as earned by him or entered on his record in medical school in his junior year without just cause and in bad faith. I have requested that counsel confine their questions to that particular issue" (R. 44).

In response to question "is there any objection on the part of counsel to the statement made by the Court", counsel for the complainant (petitioner) and for the respondents answered, "No objection" (R. 45).

Testimony was taken, orally, before the trial judge, without a jury, for three days, at the conclusion of which counsel for complainant (petitioner) amended the complaint (R. 36-39). In the amended complaint, it was

alleged, in substance, that the respondent, Dr. Walter B. Frommeyer, arbitrarily and capriciously changed complainant's (petitioner's) grade in Medicine, from a passing to a failing grade (R. 37); that Dr. Champ Lyons, a member of the Junior Promotions Committee, who attended the meeting of said Committee on May 28, 1964 (who died prior to the filing of this case), arbitrarily and capriciously changed complainant's (petitioner's) grade in Surgery from a passing to a failing grade (R. 38); that, had the complainant's (petitioner's) true and rightful grade, in Surgery been presented to the Junior Promotions Committee, at its meeting on May 28, 1964, said Committee would not have recommended that he be dismissed as a student in the Medical College of Alabama (R. 39).

In respondents' answer to the amended complaint (R. 40-41), the above allegations were denied.

Following the trial of this case, an interim decree was entered by the trial judge (R. 560-561), in which it was stated, in part:

> "That as many of the regularly constituted members of the Junior Promotions Committee who were in that status on May 28, 1964, as are presently alive and connected with the Medical College of Alabama shall hold a meeting, forthwith, and review the record of complainant and the previous activities and meetings of the said Junior Promotions Committee and deliver the recommendations of said Junior Promotions Committee immediately thereafter to this Court for its consideration in arriving at a final decree in this cause" (R. 561).

As stated in the opinion of the Supreme Court of Alabama, every member of the Junior Promotions Committee, who attended the meeting thereof on May 28, 1964, testified on the trial of this case, except Dr. Glenn

H. Baird, who was ill; and, Dr. Champ Lyons, who died prior to the filing of this case. Each of the respondents, with the exception of Dr. Baird, and Dr. Frank A. Rose, was present during practically the entire trial, and heard the testimony which was introduced. The respondents, Dr. S. Richardson Hill, Dean, and Dr. Walter B. Frommeyer, Chairman of the Department of Medicine, Medical College of Alabama, were present during the entire trial, and heard all of the evidence which was introduced.

Thereafter, following receipt from the Junior Promotions Committee of a written report of its review of complainant's (petitioner's) record in the Medical College of Alabama, together with its recommendations, all approved by the Dean of said Medical College, the trial judge rendered his final decree in this case denying the relief requested by complainant (petitioner) in his amended complaint (R. 561-564), in which it was stated, in part:

> "That the action of the Junior Promotions Committee and the other officials of the Medical College of the University of Alabama, including all the Respondents in this cause, which resulted in the ultimate dismissal of complainant from said Medical College were not arbitrary, capricious, without just cause or in bad faith, and, further that had the alleged 'true and rightful grades' earned by him in certain courses during his Junior year in the said Medical College been presented to the Junior Promotions Committee on May 28, 1964, the ultimate result would have been the same, namely, complainant's dismissal from said Medical College." (Emphasis added.)

An appeal was taken, from said final decree, to the Supreme Court of Alabama, which, in an opinion dated June 6, 1968 (211 So. 2d 489), affirmed said final decree. A true and correct copy of said opinion is attached, as Appendix "A", to the petition for writ of certiorari.

ARGUMENT.

I.

As answering the first question presented in the petition for writ of certiorari (P. 2), reference is made to **Connelly v. University of Vermont and State Agricultural College**, 1965, D. C., Vt., 244 F. Supp. 156, which is cited in the opinion of the Supreme Court of Alabama. Said case is also cited in the petition (P. 8-9), as authority for the statement that "a court does not interfere with the management of a school's internal affairs unless there has been a manifest abuse of discretion or where the school authorities have acted arbitrarily and unlawfully" (P. 7).

In the opinion of the Supreme Court of Alabama there is cited the following excerpt from the brief filed on behalf of the petitioner in said court:

> "Appellant states in brief:
>
> 'Any discretionary act of the Junior Promotions Committee as a whole is not an issue on this appeal. We are only concerned with the arbitrary and capricious acts of Dr. Champ Lyons and Dr. Frommeyer in arbitrarily and capriciously changing the complainant's grades in Surgery and Medicine. These arbitrary and capricious acts ultimately led to the decision of the Junior Promotions Committee to dismiss the complainant.'"

II.

On the trial of this case there was presented, for the determination of the trial judge, sitting without a jury, a clear question of fact, as delineated in complainant's (petitioner's) amended complaint (R. 36-39), and in respondents' answer thereto (R. 40-41). It is submitted that, in considering this petition, this Court should not

re-examine, as a court of first instance, the findings of fact contained in the final decree of the trial judge and affirmed in the opinion of the Supreme Court of Alabama, which findings of fact, it is submitted, are supported by substantial evidence. **General Motors Corporation v. Washington**, 1964, 377 U. S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430; **Bantam Books v. Sullivan**, 1963, 372 U. S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584; **Norton Co. v. Department of Revenue of State of Illinois**, 1951, 340 U. S. 534, 71 S. Ct. 377, 95 L. Ed. 517.

III.

The second question presented in the petition for writ of certiorari (P. 2) is ambiguously stated. It assumes, as an accomplished fact, that the student has been dismissed from school as the result of an arbitrary and capricious act of a department head who changed his grades. If such assumption is factually correct, then, in line with the principle recognized in **Connelly v. University of Vermont and State Agricultural College**, supra, the dismissal of the student would be actionable. The ambit of such principle, however, does not embrace a hearing, with supporting counsel, before the committee initially responsible for the dismissal, or other administrative unit of the college with the authority to review the action resulting in the dismissal. Such right of action, of necessity, includes a suit of some nature, such as the instant case.

Unless the above assumption is intended to be implied in the second question presented in the petition, it must be construed as posing the question of whether a student, in a state supported medical college, has a constitutional right to be present, being represented by counsel, and to be afforded a hearing, before being dismissed for deficiency in grades, or academic achievement.

The case of **Dixon v. Alabama Board of Education**, 1961, 5th Cir., 294 F. 2d 150, is cited in the petition as

supporting an affirmative answer to said second question. Said case is cited in the opinion of the Supreme Court of Alabama, with the statement that it is not an apt authority, in that the dismissal in said case was based upon misconduct, not deficiency in grades.

Other authorities are cited in the opinion of the Supreme Court of Alabama as supporting the statement that "even the federal courts have not yet gone so far as to require the notice and presence of the student when a decision is being reached to dismiss a student for failing to meet the required scholastic standards." Such includes an apt quotation from the case of **Barnard v. Inhabitants of Shelburne**, 1913, 216 Mass. 19, 102 N. E. 1095.

In the opinion of the Supreme Court of Alabama, there is quoted the statement contained in the annotation, "Right of Student to hearing on charges before suspension or expulsion from educational institution", 58 A. L. R. 2d 903, 906. "Even though a hearing is required prior to expulsion of a student on grounds of misconduct, it may not be required where the student is expelled for his failure to attain to the requisite scholastic standard." The case of **Barnard v. Inhabitants of Shelburne**, supra, is cited as authority for such statement of principle.

The distinction between dismissal of a student for misconduct, on the one hand, and dismissal for scholastic deficiency, on the other hand, is recognized in the case of **Woody v. Burns**, 1966, Fla. App., 188 So. 2d 56, which case is cited in the opinion of the Supreme Court of Alabama, as shown by the following excerpt from the opinion therein:

> "It has been held that constitutional due process requires notice and opportunity for hearing before a student at a tax-supported college or university can be expelled for misconduct. Due v. Florida A. & M. University, 233 F. Supp. 396 (N. D., Fla. 1963), and

Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961). This court is compelled to follow these decisions, the basis of which is that a charge of misconduct, as opposed to failure to meet the scholastic standards of the college, depends upon a collection of the facts which are easily colored by the point of view of the witness." (Emphasis added.)

It is submitted that neither the due process provision of the Fourteenth Amendment of the Constitution of the United States, nor any other provision thereof, was violated by the decision of the Supreme Court of Alabama that notice and the presence of the student is not required when a decision is being reached to dismiss a student for failing to meet the required scholastic standards.

CONCLUSION.

In conclusion, it is respectfully submitted that the petitioner has not shown sound and sufficient reason for granting certiorari, and that the petition should be denied.

Respectfully submitted,

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Certificate of Service.

This is to certify that a copy of the foregoing brief has been mailed by United States Mail, properly addressed, and with postage prepaid, to Robert C. Barnett and Barnett & Tingle, 401 Title Building, Birmingham, Alabama, Attorneys for Petitioner, on this the 17th day of September, 1968.

.....

Andrew J. Thomas,
Attorney for Respondents.